

OCA 87-2809

OFFICE OF CONGRESSIONAL AFFAIRS**Routing Slip**

	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	XX	
3. DD/Senate Affairs		X
4. Ch/Senate Affairs		
5. DD/House Affairs		X
6. Ch/House Affairs		
7. Admin Officer		
8. Executive Officer		
9. FOIA Officer		
10. Constituent Inquiries Officer		
11. <input type="text"/>		X
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SUSPENSE

22 JULY 87
DateAction Officer: Remarks: Comments noted per telecon on 7-24-87 to OMB. See OCA 87-3224. 1 JULY 87
Name/Date

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Remarks:

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

O/CONGRESSIONAL AFFAIRS

87-2809

SPECIAL

OCA FILE

RECPT #

June 30, 1987

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer-


Department of State - Howdershell - 647-4463 (25)
National Security Council - Pearson - Room 381
Department of Defense - Brick - 697-1305 (06)
Arms Control and Disarmament Agency - Christopher - 647-8690 (03)
Department of Health and Human Services - White - 245-7750 (14)
Central Intelligence Agency - STAT

SUBJECT: Justice draft report on H.R. 901, "The Biological Weapons Act of 1987."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than JULY 22, 1987.

Questions should be referred to Rooney/Thau (395-7300), the legislative analyst in this office.


RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosures

cc: B. Howard
G. Rawitscher
J. Cooney

SPECIAL



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is in response to your request for the views of the Department of Justice on H.R. 901, the Biological Weapons Act of 1987. The Department of Justice recommends enactment of this legislation if amended as suggested below.

This bill would implement the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction. Article I of the Convention prohibits the signatory countries from developing or possessing such materials "of types and quantities that have no justification for prophylactic, protective or other peaceful purposes." Article IV of the Convention requires that the parties take necessary measures to "prevent the development, production, stockpiling, acquisition or retention of such agents or delivery systems within their territories or under their jurisdiction or control." In addition to fulfilling any remaining obligation of the United States under Article IV of the Convention, the bill would be a useful law enforcement measure because it would enable the Department of Justice to prosecute individuals who possess dangerous biological materials for no legitimate purpose, without having to wait for the materials to be misused.

This bill creates new criminal penalties and provides for forfeitures and injunctions. We think that some technical changes would clarify and improve the efficacy of these provisions.

Section 175 of the bill provides:

"Whoever, in the United States or under the jurisdiction or control of the Government of the United States anywhere--

"(1) knowingly develops, produces, stockpiles, transfers, acquires, retains,

- 2 -

or possesses any agent, toxin, or delivery system for use as a weapon of mass destruction; or

"(2) knowingly assists a foreign state or an international organization (as defined in section 1116 of this title) to manufacture or otherwise acquire any agent, toxin, or delivery system for use as a weapon of mass destruction; shall be fined under this title or imprisoned for life or any term of years, or both.

The opening clause of section 175 appears to be an effort to give the bill extraterritorial applicability. To make it more consistent with other portions of Title 18 which have extraterritorial application (e.g., 18 U.S.C. §§ 7(7) and 1512(f)), we suggest omitting the phrase "in the United States or under the jurisdiction or control of the Government of the United States anywhere" and adding a new sentence at the end of section 175 after the penalties: "There is extraterritorial Federal jurisdiction over an offense under this section committed by a national of the United States."

In paragraph (1) of section 175 (and in paragraph (1) and (2) of section 176, and in paragraph (3) of section 177), we would insert "biological" before "agent". Although the title of the bill and the definitions imply that the bill controls biological, as opposed to chemical, agents, this needs to be made explicit within the operative language.

Also with respect to section 175, we suggest that all of current paragraph (2) be deleted in favor of placing at the end of paragraph (1) the phrase, "or knowingly assists any person or organization to do so." We believe that giving the section extraterritorial application and forbidding assistance to any person or organization would adequately cover international offenses. If Congress wishes to emphasize that it is addressing international violations here, we suggest that consideration be given to redefining, in this bill, the term "international organization." It is now defined in paragraph (2) by reference to 18 U.S.C. § 1116, which in turn incorporates 22 U.S.C. § 288. These two sections refer to recognized public organizations created pursuant to treaty or special governmental designation. Defining "international organization" by reference to these two sections thus has the effect of limiting the term to official, government-sanctioned organizations and omitting international terrorist groups. We believe that it would be preferable to leave the term undefined.

Finally, with respect to section 175, we would suggest adding a new paragraph (2) which would provide that whoever

- 3 -

"knowingly produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin, or delivery system, knowing or having reason to know that it is primarily useful as a weapon of mass destruction;"

would be guilty of an offense. Paragraph (1) would thus cover the case in which materials with legitimate purpose were being held with the intent to use them for an improper purpose. New paragraph (2) would allow the government to charge a defendant who is in unexplained possession of biological weapons without having to show how he intended to use them. New section 178 provides a statutory defense to paragraph (2), as explained below.

Section 176 authorizes forfeiture of biological weapons. We suggest that the "and" which separates the paragraphs should be changed to "or." Conduct under either paragraph should be sufficient to justify a forfeiture.

Part (b) of section 176 outlines a defense to a forfeiture proceeding. For reasons explained below, we suggest that this be omitted from section 176 and added to a new section 178. We think the defense should apply only to paragraph (2) of Part (a). We do not believe that there could or should be a defense to knowing conduct with biological weapons which are intended for use as weapons of mass destruction.

Section 177 authorizes injunctive proceedings. It appears that, under paragraphs (2) and (3) of Part (a), an injunction could be sought for "planning" to engage in prohibited conduct, or for the "development" of an agent or toxin. We suggest that these terms be struck as redundant with other terms in the same paragraphs, or defined as including an action element to make clear that mere speech is not actionable. The same considerations suggest that "develops" should be struck from section 175(1). Also, we suggest that the defense outlined in Part (b) be moved to a new section 178.

Current section 178 contains the bill's definitions. If our suggestion on placing the defense portions of the bill in a new section 178 is adopted, the definitions should be placed in a new section 179.

Current section 178(6) explicitly states that the bill's provisions cover actions by "governmental entities and personnel." Although the language of the bill is somewhat different from that of the Convention, we assume that the bill's intent is to go no further than the requirements of the Convention. A difficulty with specifically including governmental entities and personnel within this bill is that,

- 4 -

read in conjunction with §§ 176 and 177, the section permits the United States to sue itself if there is a violation by the government. This provision thus violates the presumption that the sovereign cannot sue itself.

As we noted earlier, we think it would be preferable to move the defense portions of sections 176 and 177 to the end of the bill. This would create a new section 178. We also suggest that the defense the bill provides to injunctive and forfeiture proceedings apply to criminal actions under paragraph (2) as well if our suggested modifications to paragraph (2) of the criminal prohibitions are adopted. This would have the effect of lowering the government's burden of proof in its case-in-chief under paragraph (2), requiring only that it show the defendant possessed material primarily useful as a weapon of mass destruction, while providing the defendant with a statutory defense in an appropriate case, i.e., when his possession of the material was proper under all the circumstances. We think that this approach is more likely to yield straightforward cases and just results.

Although we have suggested a number of changes, the Department has no disagreement with the overall intention of the bill.

The Department of Justice recommends enactment of this legislation if amended as suggested above.

Sincerely,

John R. Bolton
Assistant Attorney General